Homeland Security's Cyber Component: A Survey of Legal Issues

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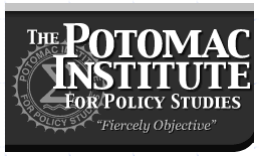

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Five broad areas of legal issues

Legal preparedness

- "Legal preparation is a vital but often overlooked aspect … [and such preparedness] affords law enforcement the necessary powers to investigate and prosecute those who possess or attempt to use" weapons of mass destruction
  - R. Pagni, Consequence management in the 1995 sarin attacks on the Japanese subway system, *Studies in Conflict and Terrorism* 25, 6 (2002).

Example

- USA PATRIOT Act
  - Harmonizes and clarifies existing law regarding the interaction among
    - Law enforcement
    - Intelligence community
    - Military

Duty of care

- Provision of reasonable measures to mitigate terror vulnerabilities that might breach that duty, and thus create damages under contract, tort, and other corporate law
  - Legislation (California Act, HIPPA, GLB)
  - Case law (Remsburg *v*. DocuSearch)

Liability

- Safe harbors
  - Encryption under the California Security Breach Information Act
- New approaches to risk management
  - Cyber insurance
  - Terrorism Risk Insurance Act of 2002
  - Business continuity and planning

Use of force

- While fashioning responses to terrorist acts, law enforcement, military, and intelligence communities need to abide by
  - U.S. domestic law
  - Those portions of international law that the U.S. recognizes
- What constitutes a use of force or armed aggression under international law?
- How does traditional law of conflict apply to operations in cyberspace?

Examples

- UN Charter defines armed aggression in terms of kinetic warfare
  - Schmitt Analysis can be used to reduce the "gray cloud of uncertainty," looking at effect rather than solely the means of attack
- How does one apply the customary rules of war in information conflict?
  - Discrimination, necessity, proportionality and chivalry

Military/Intelligence

- To what extent should the US military be involved in conducting domestic counterterrorism operations? (Posse Commitatus)
- To what extent may the intelligence community share information on US persons? (intelligence oversight)

Information sharing

- Voluntary (bottom-up)
  - Example: AGORA
- Legislated (top-down)
  - Example: Homeland Security Act of 2002 provides encouragement for the private sector to participate in Information Sharing and Analysis Centers (ISACs) and other information-sharing arrangements

Example of information sharing

- Data Retention
  - Collect all intercepted communication data or content
  - Can be made voluntary or mandatory
  - Can be instituted by both
    - Governments
    - Non-governmental organizations (NGOs)
- Data Preservation
  - Does not treat the collection of data
  - Preserve existing data of a specific
    - Type
    - Person or group
    - Time period
  - Typically conducted on a case-by-case basis via a court order

Some legal issues related to retention and preservation

- Use of communication data, for instance, for predictive purposes - need special controls?
- There are different legal regimes in place for governing communication data and content
- There is little customary international law on data retention